MOTION FILED
MAR 29 1985

No. 84-822

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, et al.,

Petitioner,

v.

HAROCO, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION OF THE INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS AND BRIEF AMICUS

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Interinsurance Exchange of the Automobile Club of Southern California respectfully moves, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as amicus curiae.

Respondent Haroco, Inc. has consented to the filing of this Amicus Brief; Petitioner American National Bank & Trust Company of Chicago has refused consent.

INTERESTS OF AMICUS CURIAE

This brief is submitted by the Interinsurance Exchange of the Automobile Club of Southern California ["EXCHANGE"].

The EXCHANGE insures over one million automobiles in the State of California through over 650 thousand policies. The EXCHANGE is the 12th largest automobile insurance carrier in the United States. ***Best's Aggregate and Averages, Private Passenger Automobile Ranking for 1983***, 58 (1984 45th ed.). The EXCHANGE is the plaintiff in a civil RICO action now pending in the United States District Court for the Central District of California, *Interinsurance Exchange v. Delug, et al.*, Civ. No. 84-8651 (MAP) (filed November 8, 1984).

This case involves a claim that Petitioner Bank's practices of keying certain of its loans to the "prime rate" constituted a violation of Title IX of the Organized Crime Control Act of 1970 (RICO). Both Petitioner and Amicus American Banking Association have emphasized the inappropriateness of using civil RICO to address what is characterized as an "ordinary, run of the mill" business dispute.

Amicus is a member of an industry which has a vital need to preserve civil RICO as a means to combat the enormous and increasing costs imposed on society and the insurance industry by insurance fraud. These costs, frequently imposed by persons engaged in organized criminal enterprises, are ultimately passed on to consumers [insureds] in the form of higher premiums. These insureds have no recourse against these illegitimate

enterprises. Insurers, on behalf of their insureds, believe that civil RICO is an effective remedy against these illegitimate enterprises. Amicus requests permission to present the arguments in the attached Brief, arguments keyed to the needs of the insurance industry, arguments in favor of preserving RICO as a viable civil remedy which may be used to attack root and branch the cancer of insurance fraud.

WHEREFORE, it is respectfully requested that the Court grant leave to the Interinsurance Exchange of the Automobile Club of Southern California to file the attached Brief as Amicus Curiae.

Respectfully submitted,

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This brief is submitted by the Interinsurance Exchange of the Automobile Club of Southern California ["EXCHANGE"].

Insurance fraud has been calculated to cost the American public in excess of 11 billion dollars a year. Insurance losses due to fraudulent claims are proliferating. Indeed, the American Insurance Association

estimates that 15-20 percent of all insurance claims are fraudulent.[1] Automobile insurance fraud alone is costing American consumers 5 billion dollars annually, and over 1.5 billion dollars in California. *County of Los Angeles, Blue Ribbon Committee on Automobile Insurance* 19 (Final Report 1984). Many of these fraudulent claims contribute to caseload congestion that afflicts both state and federal courts to the detriment of legitimate users of the civil adjudicatory system.

With increasing frequency insurers are relying on the civil remedies contained in Title IX of the Organized Crime Control Act of 1970 (RICO) to attack insurance fraud by focusing on those whose combined efforts result in illegal insurance claims.

Amicus has a strong interest in assuring that the decisions rendered by this Court in *Sedima S.P.L.R. v. Imrex Co., Inc.*, No. 84-648 and *American National Bank of Haroco,* No. 84-822, be made with recognition that a wide range of illegitimate conduct supports recourse to RICO. Too much has been already made by some courts of the perceived misuse(s) of RICO, based in large part, on the identity of the defendants.[2] Amicus

[1]New York Times, July 6, 1980, at 27, col. 1, at 28, col. 4 (from G. Patrick Riggs of the American Insurance Association). In Los Angeles County, staged accidents alone are projected to be between 100-200 million dollars a year. *County of Los Angeles, Blue Ribbon Commission on Automobile Insurance,* 19 (Final Report 1984). *See generally,* Blakely, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg,* 58 Notre Dame L.Rev. 237, 344-45 (1982) (collecting statistics on damages resulting from fraud and other offenses).

[2]Thus, the circuit court in *Sedima S.P.L.R. v. Imrex Co., Inc.* 741 F.2d 482, 487 (2d Cir. 1984) stated:

> Given the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous. Section 1964(c) has not proved particularly useful for generating treble damage actions against mobsters by victimized business people. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch [footnote omitted], to name a few defendants labeled as "racketeers" in civil RICO claims resulting in published decisions.

respectfully submits that the correctness of the application of a statute turns not on the name of the defendant but on the determination of whether the conduct complained of is addressable by the statutory scheme.

No insurer willingly pays fraudulent claims. Existing patterns of insurance fraud make detection difficult. The combination of claimants, doctors, lawyers, and their insiders helps to create a strong facade of respectibility to the claims. And even when the facade is cracked in individual cases, the dismissal or abandonment of the fraudulent claim becomes simply a cost of doing business to the enterprise. Civil RICO provides insurers with the means to seek out and destroy these illegal enterprises.

SUMMARY OF THE ARGUMENT

The proper construction and application of the private remedies contained in RICO have generated considerable opinion writing and disagreement among the Circuits. The two cases now before this court, *Haroco v. American National Bank,* No. 84-822, and *Sedima S.P.R.L. v. Imrex Co.,* No. 84-648[3], exemplify this disagreement and division.

[3]The conviction requirement suggested by the Second Circuit in *Sedima* is not involved in the *Haroco* decision. Amicus supports in full the arguments made by the States who joined in the Amicus Brief in Support of Petitioner in *Sedima S.P.L.R. v. Imgex Co., Inc.,* No. 84-648 (Brief filed Feb. 28, 1985).

Some courts, perhaps unhappy with the extension of RICO's private remedies to what those courts have characterized as "garden variety fraud," and concerned with the prospect of perhaps an unwise use of RICO in particular cases, have offered strained interpretations of the language of RICO.[4] These courts have discarded a contextually more likely interpretation for a less plausible one which is more consistent with *their* view of the benefits and wisdom of RICO. Such an attitude characterizes the *Sedima* case now before this Court. The Seventh Circuit on the other hand correctly recognized its institutional responsibility, as stated by this Court in *Tennessee Valley Auth. v. Hill,* 437 U.S. 153 (1978), to apply the statute as written and not engage in judicial revisionism of legislative history to avoid plain statutory language. 747 F.2d at 398-99. The polestar of statutory construction is not judicial appreciation of the wisdom or lack thereof in a statute, but rather the language of the statute itself. As most eloquently expressed by Justice Jackson, statutory construction must proceed "by analysis of the statute instead of by psychoanalysis of Congress." *United States v. Public Utilities Comm'n,* 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

It is evident that some lower courts, and the Second Circuit in particular, have impiemented their concerns over the wisdom and appropriateness of civil RICO via a strained and unnatural construction of RICO's causation requirements. This strained construction has been followed by petitioner by its treating as interchangeable the causation element in Section 1964(c) of RICO and the language in Section 1962(c) which defines and describes the substantive elements of a RICO cause of action. It is Amicus' contention that any construction

[4]These cases are collected in the *Sedima* and *Haroco* decisions (*passim*).

of RICO must begin with the simple differentiation between the causation requirement set forth in Section 1964(c) and the definition of RICO offenses in Section 1962. This distinction is not only consistent with the stated goals and purposes of RICO, but will also avoid the confusion that has been engendered by appellate court decisions which seek to ascribe some mythology and magic to the causation requirement contained in Section 1964(c).

Amicus further disagrees with the contention that a private civil RICO action requires pleading and proof that an "integral relationship" exists between the pattern of racketeering activity and the conduct of the enterprise's affairs. Petitioner's Brief, p.17. The "integral relationship" contention has not been used in criminal RICO cases. Since Section 1962(c) is common to both criminal and civil RICO prosecutions, adoption of the "integral relationship" test would put at risk prior criminal RICO convictions. The "integral relationship" test would also reduce the scope and effectiveness of RICO by limiting RICO's application whenever the central purpose of the enterprise was not wholly illegitimate.

A. A Person is Injured in his Business or Property by Reason of a Violation of Section 1962 Whenever His Injury is Fairly Traceable to the Conduct that Constitutes the Violation of Section 1962.

Much has been made of the use in Section 1964(c) of the phrase "injury to business or property by reason of a violation of Section 1962." The lower courts have read the "by reason of" language as requiring anything from competitive injury to racketeering injury to simple causation established by reference to the commission

of the underlying predicate acts.[5]

The issue before this Court is what type of causation requirement is created by the phrase "by reason of a violation of Section 1962." Three positions are being offered. First, Amicus contends that the natural reading of that language only requires that the injury to business or property be fairly traceable to the conduct of the defendant that constitutes the activity proscribed by Section 1962.[6] Second, Petitioner contends that the "by reason of" language gives rise to a proximate cause requirement that in turn requires a showing that there exists an "integral relationship" between the pattern of racketeering activity and the conduct of the RICO enterprise. Third, the Second Circuit in *Banker's Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), *pet. for cert. pending,* 53 U.S.L.W. 3367 (Oct. 24, 1984) articulated the requirement that the "by reason of" language requires a showing that the RICO plaintiff's injury was caused exclusively by the fact of a violation of Section 1962; if any of the injury was a consequence of the conduct leading to a violation of Section 1962, no private action under RICO is made out.

1. Section 1964(c) Imposes a Simple Cause in Fact Requirement.

The legal standard to be applied here has been frequently stated by this Court. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their

[5]*See Haroco, Inc. v. American National Bank,* 747 F.2d 384, 387-89 (7th Cir. 1984) and *Sedima S.P.L.R. v. Imrex Co., Inc.,* 741 F.2d 482, 492-94 (2d Cir. 1984) (collecting cases).

[6]This Court has frequently used the term "fairly traceable" when defining the cause in fact requirement. *See Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 72 (1978) (standing).

ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979). Construing "by reason of" is not a Herculean task. There can be little doubt but that the phrase "by reason of" simply imposes a traditional cause in fact requirement on a civil RICO plaintiff.

The phrase "by reason of"[7] is a derivation of the term "by" and synonymous with that term and such phrases as "by means of." *See* Oxford English Dictionary, p. 1231 (VII In Phrases). The legal interchangeability of the term "by" and phrases "by reason of" and "by means of" has been frequently noted. *See* 5A Words & Phrases, p. 824 (1968). Roget's *Thesaurus* identifies "by reason of" as a preposition whose linguistic idea is paralleled by such terms as "by the act of", "through the medium of", "by", "through". Roget's *International Thesaurus,* p. 429, 656.8 (3d ed. 1962). The phrase "by reason of" plainly conveys the requirement of a causal link between the language immediately before it "(injury to business or property") with the language immediately after it ("violation of §1962"). This simple statutory cause in fact requirement fulfills the statutory purpose of identifying those persons who have been significantly affected by the challenged *conduct.*

[7]The phrase "by reason of" is not generally separately defined in dictionary texts. The parallel term "by" and the parallel phrase "by means of" are defined. The term "by," as used in Section 1962(c) is a term which when used as a preposition is followed by a word or phrase naming the causative agent, means, or instrumentality. Webster's Third New International Dictionary, p. 307; American Heritage Dictionary of the English Language, p. 182. A similar definition is provided for the phrase "by means of." Webster's Third New International Dictionary, p. 307 ("By means of" is a preposition which means "through the agency or instrumentality of.")

2. There Is No Basis For Limiting Civil RICO Actions To Injuries Resulting Exclusively From The Fact Of A "Violation" Of Section 1962.

The position that a causal link must exist between the injury and the fact of "violation" of Section 1962 is addressed in *Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), *pert. for cert. pending,* 53 U.S.L.W. 3367 (Oct. 24, 1984). The essence of the circuit court's decision in *Bankers Trust Co.* is that a civil RICO action cannot be stated unless the "injury to business or property" is caused exclusively by the fact of a "violation of §1962". *Id.* at 517.

This Court, in evaluating the "by reason of a violation" language must recognize that *conduct* and not the violation of a statute causes injury. The finding that a statutory violation has occurred is a legal conclusion applied to underlying conduct. The conduct not the violation gives rise to the injury sustained by the plaintiff. There is no reason to believe that Congress intended that the causation element require proof of injury traceable to the abstraction known as a violation of a statute rather than proof of injury traceable to the conduct which itself constitutes the violation. As noted by Justice White last term in *Escondido Mutual Water Company v. La Jolla,* __ U.S. __, 104 S. Ct. 2105, 2110 (1984):

> [I]t should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses. . . .

If this Court holds that plaintiff must establish a cause in fact linkage between the injury to business or property and the fact of a violation, it would be impossible for any civil RICO plaintiff to prevail absent the most absurd

and unusual circumstances. For example, where the claim arises from a staged accident or the claim is wholly fictitious, the injury to the insurer is direct and results from investigation or payment, or both, of the claim. In neither case is it realistic to say that the injury is the exclusive result of the abstraction known as a violation of Section 1962(c). Thus, under *Banker's Trust Co.,* such injuries would not be compensated under civil RICO because while the injuries are the direct result of the conduct proscribed by §1962(c), that consideration is irrelevant under the theory of liability espoused. Under *Banker's Trust Co.,* the only potentially qualifying injury would be if the costs of fraud investigation and payments lead to an increase in rates, leading to a decrease in customers, leading to a loss of profits (See examples noted at 741 F.2d at 517.) To contemplate that Congress intended civil RICO would reach only such indirect and remote injuries puts a whole new tilt to the concept of causation. It can hardly be accepted that Congress explicitly adopted a private right of action, a right of action which forms an integral part of the overall attack on organized criminal activity set forth by Title IX of the Organized Crime Control Act of 1970, and limited its reach *only* to remote injuries attributable to RICO offenses, such as those described here and in *Bankers Trust Co.*

3. Section 1964(c) Does Not Create a Proximate Or Legal Cause Requirement that Incorporates Section 1962(c).

Petitioner recognizes the bankruptcy of the argument sounded in *Bankers Trust Co.* (see Petitioner's Brief, pp. 12-13). It argues that Section 1964(c) creates a proximate or legal cause requirement satisfied by petitioner's construction of §1962(c) that a civil RICO plaintiff establish that the RICO defendants controlled, directed or managed the RICO enterprise, or put another

way, that the pattern of racketeering activity be integrally linked with the management and operation of the enterprise's affairs.[8]

The difficulty with this argument is that it converts the simple cause in fact requirement of Section 1964(c) into an amorphous and intrusive proximate cause requirement. The proximate or legal cause concept is a policy-based concept that operates to impose limits on the scope of liability short of that which would be allowed were simple cause in fact the sole criterion. This point is clearly made by Prosser & Keeton:

> The term "proximate cause" is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established.

W. Prosser & W. Page Keeton, *The Law of Torts,* 273 (5th ed. 1984).

The proximate cause argument put forward by petitioner[9] rests on a strained, unnatural construction

[8]Petitioner's Brief, p. 11.

[9]The term "proximate cause" was used by the court in *Haroco.* Amicus suggests that the result in *Haroco* was correct and the court did use a cause in fact approach notwithstanding the use of the term "proximate cause":

> This holding by no means renders superfluous the requirement in §1964(c) that the plaintiff be injured "by reason of" a violation of Section 1962. As we read this "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of Section 1962 must, directly or indirectly, have injured the plaintiff's business or property. . . . This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straightforward reading of the statute as Congress intended it to be read.

747 F.2d at 398.

of the phrase "by reason of." Section 1962(c) describes the relationship that must exist between the RICO defendant(s) and the enterprise. Section 1964(c) confers standing on persons to sue for covered injuries. The appropriate construction of Section 1962(c) is not linked to the issue of causation derived from §1964(c). While causation is an element of liability, it does not define liability. This Court should not repeat the mistake noted by Prosser by transmutting the expressed cause in fact requirement of §1964(c) into the amorphous legal cause requirement. W. Prosser & W. Page Keeton. *The Law of Torts,* 272 (5th ed. 1984).

The suggestion that some ill defined proximate cause requirement exists as a brooding omnipresence over civil RICO actions creates the opportunity for much mischief. The doctrine of proximate or legal cause is sensibly applied where liability has been created by the common law process of reasoned elaboration. Courts, having recognized a right of action, legitimately have a role in defining the scope and extent of that right. That argument is not available where, as here, the right of action is created by Congress. It is Congress' perogative to define the scope and extent of the right of action it has created.[10] Lower courts might see this Court's acknowledgment that the proximate cause doctrine exists as an appendage to RICO as providing those lower courts with a license to engage in a free-wheeling

[10]Ironically, the proximate cause requirement is not generally considered to be applicable to fraud cases. *See* W. Prosser & W. Page Keeton, *The Law of Torts,* p. 728 (5th ed. 1984) (stating elements of prima facie case). Since fraudulent conduct permeates so many of the RICO predicate offenses, inclusion of a proximate cause requirement suggests a statutory remedy that would be less advantageous than the common law remedy of fraud. Such a suggestion is not consistent with this Court's decision in *Turkette,* 452 U.S. 576, 585 (1982).

construction of Section 1962. Seen in this light, the proximate cause issue adds nothing to the analysis of a civil RICO cause of action.

B. Section 1962(c) Only Requires That The Conduct That Constitutes the Predicate Acts Be Related to the Activities of the RICO Enterprise.

Section 1962 is the core of civil RICO defining the types of conduct that create liability. Section 1962(c) requires:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Petitioner asserts that §1962(c) requires a showing of an "integral relationship between the pattern of racketeering activity and the conduct of the enterprise's affairs. . . ." Petitioner's Brief, p. 17. Neither the language of Section 1962(c) nor the consistent, overwhelming case law construing Section 1962(c) support Petitioner's assertion.[11]

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[11]One circuit court has agreed with the approach suggested by Petitioner. *See Bennett v. Berg,* 710 F.2d 1361, 1364 (8th Cir.) (en banc), *cert. denied,* 104 S. Ct. 527 (1984). The *Bennett* decision is not persuasive. First, it fails to appreciate that its approach is inconsistent with every circuit court that has considered the scope of Section 1962(c). Second, the Bennett court's reliance on the panel decision in *United States v. Mandel,* 591 F.2d 1347 (4th Cir. 1979) fails to note that the Fourth Circuit (en banc) ultimately affirmed the conviction of former Governor Mandel by an equally divided court. 602 F.2d 653 (4th Cir. 1979). A majority of the Fourth Circuit members of the en banc court would have affirmed the judgments of conviction against *all* contentions, except the jury charge which

Section 1962 does not discriminate against particular types of interaction by "distinguishing between predicate acts which play a major or a minor role, or any role at all, in what may be seen as the usual operations of the enterprise; nor does it require that such acts be in furtherance of the enterprise. . . ." *United States v. Stofsky,* 409 F.Supp. 609, 613 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. den.,* 429 U.S. 819 (1976). RICO does not discriminate between near and remote actors or those merely associated with the enterprise. *See United States v. Elliott,* 571 F.2d 880, 903 (5th Cir.), *cert. denied sub nom., Delph v. United States,* 439 U.S. 953 (1978). The RICO net is woven tightly to trap the smallest fish, even those peripherally involved with the enterprise.

Indeed, in *United States v. Scotto,* 641 F.2d 47 (2d Cir. 1980), (Oakes, J.), *cert. denied,* 452 U.S. 961 (1981), the court specifically rejected an "integral relationship" test. The court noted that Section 1962 "declines to define in qualitative terms the degree of interrelationship between the pattern of racketeering and the conduct of the enterprise's affairs." *Id.* at 54. Petitioner's suggested construction of Section 1962(c) stands in sharp contrast to the uniform, consistent construction Section 1962(c) has received in criminal RICO cases.

Concededly, there is breadth to Section 1962(c); nonetheless, the provision is straightforward: A person may not *conduct* or *participate, directly or indirectly, in the conduct* of the affairs of the enterprise through a pattern of racketeering. 18 U.S.C. Section 1962(c). An "integral relationship" is not compelled by the term "conduct" or the phrase "participate, directly or indirectly, in the conduct." The term "conduct" has a

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was the point of equal division. The discussion of Section 1962(c) in *Mandel* did not involve the jury charge. 591 F.2d at 1374-75.

range of meanings: a strong meaning which includes the concept of management and direction,[12] and a weak meaning which includes the notion of execution or carrying out of tasks. Webster's Third New International Dictionary, p. 473. This Court should give effect to all meanings of the term "conduct."

Section 1962(c) does *not* use the term "manage" or "direct" or "control." Congress thus eschewed more specific terms in favor of a generalized term that encompasses a range of meanings. There is no basis for this Court transforming Congress' general term into the limited term petitioner espouses. This Court should follow the policy adopted in its previous RICO decisions in *Turkette* (452 U.S. 576 (1981) and *Russello* (104 S. Ct. 296 (1983)) of giving RICO terms the broad construction to which they are susceptible, rather than picking out, from the range of meanings, a narrow, restrictive construction.

Even if Congress intended that RICO would be primarily directed toward situations where there was an "integral relationship" between the racketeering activity and the enterprise, it is not a proper judicial function to limit the plain language of a statute to *only* that primary activity. *See U.S. v. Elliott,* 571 F.2d 880, 897 n.17 (5th Cir. 1978). A comprehensive statute should not be gelded under the guise of construction. *United States v. Raynor,* 302 U.S. 540, 552 (1938) (no rule of construction requires that statute be given the "narrowest meaning").

First, a general rule of stautory construction is to interpret the whole statute and not just the particular word or phrase under scrutiny. 2A Sutherland Statutory

[12]Petitioner relies on these strong meanings of the word control to support its contention that there must be an "integral relationship" between the racketeering activity and the enterprise. Petitioner's Brief, p. 17.

Construction, Section 46.05, p. 90 (4th ed.) In this regard, attention should be directed to the language in §1962(c) that extends liability to those who "participate, directly or indirectly, in the conduct. . . ." The term "participate" suggests that the term "conduct" should not be limited to a strong meaning for "participate" suggests "sharing," not control. Webster's Third New International Dictionary, p. 1646. Congress' adoption of a generalized or weak sense of the term "conduct" is also suggested by the qualifiers to the term "participate." To state that a person may participate, "directly or indirectly," in the conduct of the enterprise suggest a level of involvement not necessarily requiring management or control or direction of the enterprise.

The use of the term "through" in Section 1962(c) does not, as petitioner's claim, support the argument that the term "conduct" is used exclusively for its strong meaning. Petitioner's Brief, p. 17. As construed by petitioner, the terms "conduct" and "through" become duplicative and redundant. If the term "conduct" is used in its strong sense, there is no need for the term "through" as that latter term is construed by petitioner. When the terms "conduct" and "through" are used in their more customary, general sense, a more natural reading of Section 1962(c) appears. Under this reading, the term "through" is given its normal meaning as a causal term rather than a qualitative term. *See United States v. Nerone,* 563 F.2d 836, 851 (7th Cir. 1977), *cert. denied sub nom. Helfer v. United States*, 435 U.S. 951 (1978); Webster's Third New International Dictionary, p. 2384 (1 through). This functional meaning is particularly called for where, as in Section 1962(c), the term "through" is used as a preposition, whereas, the meaning urged by petitioner is more appropriate where the term through is used as an adverb. Webster's Third New International Dictionary, p. 2384 (2 through).

Second, the consistent judicial interpretation of Section 1962(c) does not support limiting the term "conduct" to the strong meaning urged by petitioner. *United States v. Scotto,* 641 F.2d 47 (2d Cir. 1980) (Oakes, Jr.), *cert. denied,* 452 U.S. 961 (1981) (one "conducts" for purposes of Section 1962(c) when the predicate offenses are related to the activities of the enterprise.)[13]

Third, the breadth Amicus ascribes to the term "conduct" is more consistent with the overall statutory scheme. Section 1962 defines that conduct which determines whether there is substantive liability under the statute. This liability provision is common to both criminal and civil prosecutions. Requiring proof of an "integral relationship" would engender confusion and complexity in RICO prosecutions by deflecting attention away from how the enterprise was operated or manipulated to facilitate racketeering activity toward an inquiry into the structure of the enterprise. RICO prosecutions would be dependent on demonstrating that the RICO defendants had the power, formal or informal, to manage, direct or control the enterprise to accomplish the racketeering activity. Such a construction would not only run counter to the intent of Congress that RICO punish behavior not status (*see* 116 Cong. Rec., part 26, Oct. 7, 1970, p. 35344 (Remarks of Mr. Poff); *United States v. Mandell,* 415 F. Supp. 997, 1018-19 (D. Md. 1976), *aff'd by equally divided Court* 602 F.2d 653 (4th Cir. 1979), *cert. denied,* 445 U.S. 961 (1980)) but also

[13]Even the Fifth Circuit which had a slightly different standard for demonstrating the requisite nexus does not come close to the rigor demanded by petitioner. *See United States v. Cauble,* 706 F.2d 1322, 1333, 1343 (5th Cir. 1983), *cert. denied,* 104 S. Ct. 996 (1984) (RICO defendant's position in enterprise must *facilitate* his commission of the racketeering acts *and* the enterprise must be *affected* by the racketeering activity).

invite RICO participants to create enterprises of byzantine complexity to frustrate and avoid prosecution. Such a construction is not consistent with the acknowledged goals and purposes of RICO "to divest the association of the fruits of its ill-gotten gains. *United States v. Turkette,* 452 U.S. 576, 585 (1980).

Adoption of an "integral relationship" requirement would enable persons who heretofore had been subject to RICO to escape liability. Thus, the union official or public officer who uses his office to facilitate racketeering activity has to date been subject to RICO (*see, e.g., United States v. Provenzano,* 688 F.2d 194, 199-200 (3d Cir.), *cert. denied,* 459 U.S. 1071 (1982) (union official); *United States v. Forsythe,* 560 F.2d 1127, 1135-37 (3d ed Cir. 1977) (public officers)), but could escape liability under petitioner's construction since the racketeering activity was not "integral" to the union or government office. Similarly, in insurance fraud cases that are of concern to Amicus, an "integral relationship" requirement might insulate from liability participants in the scheme who derive a portion of their income from the racketeering activity, but who otherwise carry on a legitimate practice. These participants might not engage in racketeering activity that is "integral" to the enterprise. In large scale insurance fraud rings many of the participants may be remote, though repeat actors, who could not be said to have a management or controlling role. Under petitioner's construction, these persons would profit from their participation in the racketeering activity, but might escape liability under RICO. Petitioner's construction would resurrect the same end this Court declared "unacceptable" in *Turkette:* "Whole areas of "organized criminal activity" would be placed beyond the substantive reach of

[RICO]." 452 U.S. at 589. This Court's comments in *Turkette* are particularly important for they emphasize that it is organized criminal activity, not just "organized crime" of the popular stereotype, that is the object of RICO. *United States v. Turkette,* 452 U.S. 576, 591 (1981). It is the person's affiliation with the enterprise, like a person's involvement in a conspiracy, that raises the greater concern resulting in RICO's sanction. This Court should no more require "integral" involvement in the RICO enterprise that it would require "integral" involvement in a conspiracy.

CONCLUSION

It must be borne in mind that the critical issue addressed by the Seventh Circuit in *Haroco* is that of causation in fact. It is respectfully submitted by Amicus that on that issue the Seventh Circuit ruled correctly—a plaintiff need only show under Section 1964(c) a cause in fact link between injury to his business or property and the conduct that constitutes a violation of Section 1962. It is unnecessary and unwise to confuse this simple issue of cause in fact with the policy issues necessarily implicit in the concept of proximate cause.

It still remains the obligation of every civil RICO plaintiff asserting that a violation of Section 1962(c) has occurred to demonstrate by the requisite burden of proof the correctness of that position. The construction of Section 1962(c) argued for by petitioner, however, is not a correct construction of that provision. Section 1962(c) only requires that the predicate offenses relate to the activities of the enterprise. Any other construction is not only inconsistent with the plain meaning of Section 1962(c), but would jeopardize each criminal conviction

that has previously been secured under the existing construction of Section 1962(c).

Respectfully submitted,

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State of California

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on March 27, 1985, I served the within *Motion for Leave to File a Brief as Amicus Curiae and Brief Amicus* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 27, 1985, at Los Angeles, California.

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